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v.

TRICORP PROPERTIES SDN BHD;
MAJLIS PEGUAM MALAYSIA (INTERVENER)

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HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[ORIGINATING SUMMONS NO: R1-25-233-2010]
10 DECEMBER 2010

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LEGAL PROFESSION: *Misconduct - Breach of undertaking - Release of security documents to unintended recipient - Whether solicitor breached undertaking by failing to obtain confirmation - Whether undertaking deemed given when solicitor did not object to instructions given - Whether solicitor deemed a stakeholder - Whether six months' suspension by Disciplinary Committee proper*

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In this appeal the respondent was the registered owner of a piece of property which had agreed to sell the property to one Man Chan Fatt as purchaser *via* a sale and purchase agreement. The agreement was prepared by the appellant who acted for the purchaser. The purchaser applied for a loan from Hong Leong Bank Berhad ('HLB') to finance the purchase. HLB appointed Messrs Anuar Hong & Ong ('Messrs Anuar Hong') to act on its behalf in respect of the loan transaction. It followed that the appellant requested the original issue document of title ('IDT') from the respondent for onward transmission to Messrs Anuar Hong upon approval of the loan. By a letter dated 23 April 2008, the respondent forwarded the IDT to the appellant on the condition that the loan documentation must be signed and that a lien holder's caveat lodged to enable the drawdown of the loan amount. It transpired subsequently that the purchaser decided not to pursue the purchase of the property and requested for the return of all the documents. It also transpired that the appellant had released the documents to one K K Ang instead purportedly on the instructions of one Dato' Alex for onward transmission to Messrs Anuar Hong when the respondent had yet to receive the balance purchase price or any assurance that they would be paid the balance purchase price. It was subsequently discovered that a private caveat was lodged on the property by one Ong Seow Fun who purportedly purchased the property from Man Chan Fatt

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who had been fully paid the purchase price. The respondent then lodged a complaint with the Bar Council that the appellant breached his undertaking to the respondent. The Disciplinary Committee ('DC') appointed to inquire into the complaint found the appellant guilty of misconduct on the ground that the respondent's letter dated 23 April 2008 to the appellant imposed an undertaking on the appellant – and that the appellant breached the undertaking for failing to obtain the respondent's confirmation before releasing the relevant security documents to K K Ang. The appellant was suspended from practice for six months. The appellant now appealed.

Held (dismissing the appeal):

(1) A solicitor's undertaking cannot be imposed unilaterally and it must be given by the solicitor in his professional capacity. The evidence showed that the relationship between the appellant and the respondent was professional. That could be discerned from the contents of the correspondences exchanged between them. (para 20)

(2) The handing over of the IDT and other documents by the respondent to the appellant was for the purpose of completion of the sale and purchase of the property. The respondent expressly instructed the appellant to act in a specific manner. The language used by the respondent in setting out the terms for onward transmission of the IDT and other related documents to Messrs Anuar Hong was clear. If the appellant was of the view that he was unable to comply with the conditions stated, then he ought to have returned the IDT and the documents to the respondent (see Ruling 14.09(1)(b), Rules and Rulings of the Bar Council Malaysia). The appellant ought to have indicated and/or communicated his disagreement or refusal to be subject to those instructions. Since there was no such objection, an undertaking arose from the appellant to the respondent that the transmission of those documents to Messrs Anuar Hong would be upon those terms stated in the letter. In the circumstances, it was reasonable for the respondent to expect the appellant to comply with the conditions stated. By conduct too, the appellant was deemed to have accepted the IDT and the other documents as stakeholder pending the occurrence of the event specified in the conditions. (paras 21 & 22)

(3) The DC did not err when it found that the respondent's letter dated 23 April 2008 imposed an undertaking on the appellant. The respondent adduced sufficient evidence before the DC to establish beyond reasonable doubt that the appellant had given the undertaking to the respondent. (para 23)

(4) The IDT was handed over by the appellant to one K K Ang purportedly on the instructions of one Dato' Alex who had no relationship to Messrs Anuar Hong, the party to whom those documents ought to have been transmitted. Therefore, the appellant acted in breach of the undertaking as expressed in the respondent's letter. For the reasons stated, the DC correctly found the appellant guilty of misconduct. (para 24)

(5) On the authority of *Gana Muthusamy v. Tetuan LM Ong & Co*, the court declined to interfere with the punishment of six months' suspension imposed on the appellant. (para 25)

[Stay pending appeal granted.]

Case(s) referred to:

Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***

Geoffrey Silver & Drake v. Thomas Anthony Baines [1971] 1 All ER 473 ***(refd)***

John Fox v. Bannister, King & Rigbeys [1986] 1 QB 925 ***(refd)***

In Re The Commonwealth Land, Building, Estate and Auction Company (Limited) [1852] 43 LJ Ch 99 ***(refd)***

Keith Sellar v. Lee Kwang [1980] 1 LNS 36 FC ***(refd)***

Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor [1982] 1 LNS 73 HC ***(refd)***

Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***

Parasuraman Kuppan v. Sazali Md Akhir & Anor [1997] 4 CLJ Supp 62 HC ***(refd)***

Tunku Ismail Tunku Md Jewa & Anor v. Tetuan Hisham, Sobri & Kadir [1989] 1 LNS 36 HC ***(refd)***

For the appellant - Wong Kian Kheong (Alex Tan with him); M/s Wong Kian Kheong

For the respondent - AN Dinesh; M/s AJ Ariffin Yeo & Harpal

For the intervener - Ringo Low; M/s Ringo Low & Assocs

For the disciplinary board - Kemkumar S Lopez; M/s Kamarudin & Partners

Reported by Usha Thiagarajah

JUDGMENT

Aziah Ali J:

[1] The appellant is an advocate and solicitor practicing under the style of Messrs Richard Ho & Yap. A complaint was lodged against the appellant by the respondent for breach of an undertaking. The complaint (exh. A1(b) was forwarded to the appellant by the Advocates & Solicitors Disciplinary Board ("DB") which requested the appellant to give a written explanation. Subsequently the appellant was informed that a Disciplinary Committee ("DC") has been appointed to inquire into the complaint. The DC found that the appellant has committed misconduct for breach of an undertaking given by the appellant to the respondent.

[2] By a letter dated 29 April 2010 (exh. A6(a) the appellant was informed by the DB that having considered the complaint and the report of the DC, the DB affirmed the finding of liability and recommendation on punishment by the DC and has ordered that the appellant be suspended from practice as an advocate and solicitor for a period of six months (exh. A6(b). This is the appellant's appeal against the order of the DB dated 23 April 2010. Having considered the written submissions and the relevant documents, I dismissed the appeal. Agreed costs of RM5,000 was awarded to the respondent. The DB was awarded costs of RM2,000 and the Bar Council was awarded costs of RM1,000.

Background

[3] The respondent was at all material times the registered and beneficial owner of all that piece of property held under H.S.(D) 132134, P.T. No. 44552, Mukim Cheras, Daerah Ulu Langat, Negeri Selangor Darul Ehsan ("the Property"). By a Sale and Purchase Agreement dated 26 March 2008 ("the SPA") the respondent as vendor agreed to sell and one Man Chan Fatt as purchaser agreed to purchase the said Property at a purchase consideration of RM900,000. The SPA was prepared, finalised and attested by the appellant.

[4] Man Chan Fatt applied for a loan from Hong Leong Bank Berhad ("Hong Leong Bank") to assist him to complete the purchase of the Property. Hong Leong Bank appointed Messrs Anuar Hong & Ong ("Messrs Anuar Hong") to act on its behalf in respect of the loan transaction.

[5] On 14 April 2008, the appellant gave a solicitor's undertaking ("Letter of Undertaking") to the respondent as follows:

> ... SUBJECT to us receiving funds into our clients account for the sum of Ringgit Malaysia One Million Four Hundred Thousand Only (RM1,400,000-00) from the above said Purchase and/or financier (Hong Leong Bhd), we hereby undertake to release the stated sum to you unconditionally upon receiving the same from the said Purchaser.

[6] By a letter dated 15 April 2008, the respondent delivered to the appellant *inter alia* the original duly executed transfer form (Form 14A) in respect of the Property ("the MOT"). By another letter also dated 15 April 2008 the respondent informed the appellant as follows:

> We shall forward the original title of document to your goodself upon your confirmation that the loan documentation has been signed and requested by the Financier's Solicitors and further provide the undertaking from the Financier and/or their Solicitors to release the loan sum to your goodself.

[7] By a letter dated 18 April 2008 the appellant forwarded to the respondent a copy of a letter dated 17 April 2008 from Messrs Anuar Hong to the purchaser in which Messrs Anuar Hong informed the purchaser that Hong Leong Bank has agreed to grant to the purchaser a loan to finance the purchase of the Property. Messrs Anuar Hong requested for amongst others the original issue document of title ("the IDT"). A similar request was made by Messrs Anuar Hong to the appellant by a letter dated 22 April 2008.

[8] The appellant requested from the respondent the original IDT to be forwarded to Messrs Anuar Hong. By a letter dated 23 April 2008 the respondent forwarded the original IDT to the appellant for onward transmission to Messrs Anuar Hong "upon their confirmation that the loan documentation has been signed and requested for the requirement/purpose to lodge a Lien-Holder's Caveat to enable the drawdown of the loan amount ...". Between 28 April 2008 to 6 May 2008 the respondent wrote three letters to the appellant requesting for confirmation whether the adjudication has been done, the status of the drawdown, whether Messrs Anuar Hong has requested for the IDT for the purpose of lodging a lien holder's caveat to enable the loan

drawdown, whether any written undertaking has been given by Messrs Anuar Hong and/or the Financier to release the loan sum and/or purchase amount to the appellant. The respondent informed the appellant that the sum of RM1,400,000 is to be paid by 9 May 2008.

[9] By a letter dated 9 May 2008 the respondent wrote to the appellant requesting for the return of the original IDT and other documents. On 13 May 2008 the respondent requested from the appellant the acknowledgment letter forwarding the original IDT to Messrs Anuar Hong. A copy of the said letter dated 23 April 2008 from the appellant to Messrs Anuar Hong was given to the respondent. However by a letter dated 15 May 2008 the appellant wrote to Messrs Anuar Hong informing them that the appellant's client, the purchaser has decided not to pursue with the purchase and requested for the return of all documents.

[10] What transpired from the appellant's 2nd affidavit is that the appellant had released the MOT and the original IDT to one K.K. Ang purportedly on the instructions of one "Dato' Alex" for onward transmission to Messrs Anuar Hong when the respondent has yet to receive the balance purchase price or any assurance that they would be paid the balance purchase price. The respondent subsequently discovered that a private caveat was lodged on the Property by one Ong Seow Fun who had purportedly purchased the said Property from Man Chan Fatt at a purchase price of RM1,500,000 which purportedly had been fully paid to Man Chan Fatt.

[11] The DC found that the letter dated 23 April 2008 from the respondent to the appellant imposed an undertaking on the appellant. In finding the appellant guilty of misconduct, the DC found that the appellant:

(i) had breached his undertaking to the respondent by failing to obtain the requisite confirmation before releasing the relevant security documents;

(ii) had breached his undertaking to the respondent by releasing the security documents to one K.K. Ang.

[12] For the appellant it is submitted that:

(a) except for the Letter of Undertaking dated 14 April 2008 the appellant did not give any solicitor's undertaking to the respondent;

(b) the appellant did not breach the Letter of Undertaking dated 14 April 2008;

(c) the appellant was not appointed as a stakeholder to hold any document for the respondent;

(d) the DC failed to take into account the doctrine of benefit of doubt;

(e) in the proceedings before the DC the rules of natural justice had been breached;

(f) the suspension order of six months is manifestly excessive and disproportionate.

Submissions

[13] Counsel for the appellant submits that a solicitor's undertaking cannot be unilaterally imposed on a solicitor. Such undertaking must be given by the solicitor in his professional capacity as a solicitor which may be summarily enforced by the court and the court may commit a solicitor to prison for failure to fulfil an undertaking as ordered by the court (*Geoffrey Silver & Drake v. Thomas Anthony Baines* [1971] 1 All ER 473; *Tunku Ismail bin Tunku Md Jewa & Anor v. Tetuan Hisham, Sobri & Kadir* [1989] 1 LNS 36). It is submitted that the appellant was not subject to any undertaking when he released the documents. Hence there could not have been a breach of undertaking as found by the DC.

[14] Counsel submits that the standard of proof required in disciplinary proceedings where the allegation of professional misconduct involves an element of deceit or moral turpitude is proof beyond reasonable doubt (*Keith Sellar v. Lee Kwang* [1980] 1 LNS 36). It is submitted that the respondent has failed to establish beyond reasonable doubt that the appellant had given a solicitor's undertaking pertaining to the release of the documents. It is further contended that the appellant was never appointed a stakeholder to hold the documents pending the occurrence of a future event.

[15] For the respondent it is submitted that the Letter of Undertaking dated 14 April 2008 is unrelated to the issues at hand. Counsel submits that the DC regarded the respondent's

letter to the appellant dated 23 April 2008 as imposing an undertaking on the respondent. The letter dated 23 April 2008 from the respondent to the appellant reads amongst others as follows:

> Reference is made to the above matter and to your undertaking letter dated 14th April 2008, your letter dated 23rd April 2008 (which was faxed to us on 22nd April 2008) and Messrs Anuar Hong & Ong's letter dated 22nd April 2008.
>
> As per your and/or Messrs Anuar Hong & Ong's request we herewith enclose the ORIGINAL title of documents (ie, HS(D) 132134, PT 44552, Mukim Cheras, Daerah Ulu Langat, Selangor) for your attention and onwards transmission to Messrs Anuar Hong & Ong upon their confirmation that the loan documentation has been signed and requested for the requirement/ purpose to lodge a Lien-Holders Caveat to enable the drawdown of the loan amount sum of RM2,340,000.00 (as per Messrs Anuar Hong & Ong's letter dated 22nd April 2008).

[16] Counsel for the respondent submits that this is the letter which gave rise to an undertaking by the appellant not to deal with the transfer forms and the IDT otherwise than in accordance with the instructions of the respondent. It is submitted that since the appellant received the documents on the terms set out by the respondent without objections, an undertaking arose that the appellant will deal with the documents only in accordance with those terms.

[17] It is further submitted that the express use of the word 'undertaking' is unnecessary as the letter ought to be construed in the light of surrounding circumstances (*John Fox v. Bannister, King & Rigbeys* [1986] 1 QB 925). Thus it is submitted that in the circumstances of this case the only proper construction to be placed on the said letter dated 23 April 2008 is that the respondent released the IDT to the appellant with a condition that it will be forwarded to Messrs Anuar Hong upon confirmation by Messrs Anuar Hong that the loan documentation has been signed and that the IDT was required for the purposes of lodging a lien holders caveat to enable the drawdown of the loan sum of RM2.34 million. Counsel submits that cls. 6.04, 7.01 and 7.02 of the SPA provide that the appellant was obliged not to release any of the documents until such time as the respondent had been paid the full purchase price or, as is acceptable in conveyancing practice, an acceptable arrangement was in place for the respondent to receive the balance purchase price. Yet the

appellant released the documents to one K.K. Ang when at the time the respondent had yet to receive the balance purchase price or any acceptable assurance that they would be paid the balance purchase price in consideration of the release of the documents.

[18] For the DB it is submitted that the correspondences between the appellant and the respondent show that the appellant has accepted the duty to be stakeholder in respect of the respondent's documents which is elementary conveyancing practice necessary for completion of the sale and purchase transaction *(Tunku Ismail bin Tunku Md Jewa & Anor v. Tetuan Hisham Sobri & Kadir, supra)*. The appellant knew the nature and effect of the undertaking and was in breach in handing over the original IDT together with the memorandum of transfer and every other relevant document necessary for the transfer of the property without first ensuring that the confirmation from the bank's solicitors that the purchaser had signed the loan documentation with the bank and that the request for the original title was to enable a lien holder's caveat to be lodged by the bank to enable the drawdown of the loan sum had come into his hands. The appellant further failed to ensure that his authorized personnel safely handed the documents to Messrs Anuar Hong but gave them to the purchaser who transferred the Property into his own name and immediately sold it to a third party.

Decision

[19] The principles of construction to be applied to an undertaking are described by Hashim Yeop A. Sani FJ, (as he then was) in the case of *Michael C. Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 as follows:

> The intention of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement.

In the case of *Parasuraman Kuppan v. Sazali Md Akhir & Anor* [1997] 4 CLJ Supp 62, Hishamudin Yunus J (as His Lordship then was) referred to the case of *In Re The Commonwealth Land, Building, Estate and Auction Company (Limited)* [1852] 43 LJ Ch. 99 where a solicitor had agreed to accept the costs of a dismissed

petition from the solicitor for the petitioners. His agreement was construed as an undertaking not to issue writs of execution and he was made liable for the costs of the proceedings to set aside the writs of execution even though the writs were issued by his clerk without his knowledge. Thus on the abovementioned authorities I agree with counsel for the respondent that the express use of the word 'undertaking' is unnecessary and that the proper construction to be placed on the respondent's letter dated 23 April 2008 is from the language used and in the light of surrounding circumstances.

[20] I agree with counsel for the appellant that an undertaking cannot be imposed unilaterally and that such undertaking must be given by the appellant in his professional capacity. On the evidence I find nothing to indicate that the relationship between the appellant and the respondent is anything but professional. This can be discerned from the contents of the correspondences exchanged between them.

[21] The handing over of the original IDT and other documents by the respondent to the appellant was for the purpose of completion of the sale and purchase of the Property. The respondent had expressly instructed the appellant to act in a specific manner. The language used by the respondent in setting out the terms for transmission of the original IDT and other documents to Messrs Anuar Hong is clear. Ruling 14.09(1)(b), Rules and Rulings of the Bar Council Malaysia states as follows:

> Where payments or documents are sent to a Solicitor subject to an undertaking or subject to conditions, the Solicitor shall promptly return such payments or documents to the sender if the undertaking or any of the conditions is/are unacceptable to the Solicitor.

I agree with counsel for the respondent that if the appellant was of the view that he was unable to comply with the conditions stated, then he ought to have returned the original IDT and other documents to the respondent. The appellant ought to have indicated and/or communicated his disagreement or refusal to be subject to those instructions. I agree with submissions by counsel for the respondent that since the appellant had received the documents forwarded by the respondent *vide* its letter dated 23 April 2008 without any objection to the terms stated in the

letter and taking into account the circumstances or purpose for the handing over of the original IDT and other documents to the appellant, there arose an undertaking from the appellant to the respondent that the transmission of those documents to Messrs Anuar Hong would be upon those terms stated in the letter. I am of the view that in the circumstances it was reasonable for the respondent to expect the appellant to comply with the conditions stated.

[22] On the issue of being a stakeholder, in *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor v. Lembaga Letrik Negara & Anor* [1982] 1 LNS 73 the court said:

> What is a stakeholder? A stakeholder is a person who receives money and holds it in medio pending the outcome of a future event. In *Burt v. Claude Cousins & Co* [1971] 2 QBD 426 at p 435 Lord Denning MR stated:
>
> If an estate agent or a solicitor, being duly authorized in that behalf, receives a deposit "as stakeholder", he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor nor as agent for the purchaser. He holds it as trustee for both to await the event ... Until the event is known it is his duty to keep it in his own hands.

In the present case the respondent had forwarded and hence authorized the appellant to receive and hold the original IDT and other documents subject to the conditions stated. The language of the respondent's letter dated 23 April 2008 is clear that the IDT and documents were forwarded to the appellant to hold pending the occurrence of the event specified. The appellant had accepted the IDT and documents forwarded by the respondent without any protest as to the conditions stated. Therefore by conduct he is deemed to have accepted that the IDT and the other documents will be held by him as stakeholder pending the occurrence of the event specified in the conditions.

[23] For the aforementioned reasons I find that the DC has not erred when it found that the respondent's letter dated 23 April 2008 had imposed upon the appellant an undertaking. I agree with the respondent that taking into consideration the evidence and the circumstances of the case, there arose an undertaking by the appellant to transmit the original IDT on the terms specified

in the said letter. On the evidence I find that the respondent has adduced sufficient evidence before the DC to establish beyond a reasonable doubt that the appellant had given an undertaking to the respondent.

[24] It is not disputed that the IDT was handed over by the appellant to one K.K. Ang purportedly on the instructions of one Dato' Alex, parties who bear no relationship to Messrs Anuar Hong, the party to whom those documents ought to have been transmitted. Thus the appellant had acted in breach of the undertaking as expressed in the respondent's letter. For the reasons stated I find that the DC has correctly found that the appellant is guilty of misconduct.

[25] On the issue of punishment, suffice for me to refer to the oft cited case of *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878 wherein Gopal Sri Ram JCA (as he then was) said:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Court must necessarily exercise caution when entertaining on appeal in which the control question is whether particular conduct in unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour. We would, in this context, express our agreement with the following passage in the Guide to the Professional Conduct of Solicitors issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:
>
> One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.
>
> In our judgment, a court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

Based on the aforementioned authority, I declined to interfere with the punishment of six months' suspension imposed on the appellant. The appeal is therefore dismissed with agreed costs at RM5,000 to the respondent and costs of RM2,000 is awarded to the DB and RM1,000 to the Bar Council.

[26] Pursuant to my decision dismissing this appeal, counsel for the appellant made an oral application for a stay on the ground that the suspension is for a period of six months and in the event no stay is allowed, and if the appeal to the Court of Appeal is not disposed off within six months, then the appellant would have served his six months' suspension which would render his appeal nugatory. There is also the issue of the appellant's livelihood. It is also submitted that this case does not involve the question of dishonesty. The DB had no objections to the stay application. Counsel for the respondent submits that the appellant ought to make a formal application. Having considered the submissions, I agree with counsel for the appellant that if stay is not granted and in the event that the appellant's appeal against this decision is not disposed off within six months then the appellant would have served his six months' suspension and his appeal would be rendered nugatory. Hence I exercised my discretion and granted a stay pending appeal.